IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20300
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN ANGEL LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-298-4)

October 31, 1995

Before GARWOOD, WIENER and PARKER, Circuit Judges.

PER CURIAM:*

In this direct criminal appeal, Defendant-Appellant Juan Angel Lopez asserts that errors were made by the district court in connection with evidentiary rulings, sufficiency of the evidence

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

and, regarding sentencing, the extent to which Lopez participated in the conspiracy. As explained below, we conclude that the district court committed no reversible error and thus affirm.

I

FACTS AND PROCEEDINGS

The case before us on appeal arose from an ongoing investigation of drug trafficking in Texas. Confidential informant Juan San Miguel was cooperating with the Drug Enforcement Administration (DEA) and other law enforcement officials when, on November 19, 1992, he drove a Chevrolet Suburban to a DEA warehouse to be loaded with 750 pounds of marijuana and 15 kilos of cocaine. San Miguel then drove the Suburban to the Concord Apartments and gave the keys to Santos Barrerra-Garcia. At that time, San Miguel discussed the delivery of the drugs with Barrerra-Garcia, Raul Alvarez, and Armando Alvarez. Law enforcement officers had maintained uninterrupted surveillance of the Suburban from the time it was loaded with the drugs at the DEA warehouse until Lopez arrived on the scene in a small red car, got into the Suburban, and drove it away. Shortly thereafter, law enforcement officials stopped the Suburban and arrested Lopez. The drugs were still in the Suburban, and a zippered pouch containing a pistol was found under the front seat.

Lopez and six others were named in a nine-count superseding indictment on January 22, 1993. Lopez was named in four of the counts: Count One (conspiracy to possess with intent to distribute marijuana and cocaine); Count Four (aiding and abetting possession

with intent to distribute cocaine); Count Five (aiding and abetting possession with intent to distribute marijuana); and Count Six (carrying and using a firearm in relation to a drug trafficking offense). Lopez pleaded not guilty to these charges and proceeded to trial by jury, in which he was convicted on all four counts. The district court sentenced Lopez to a term of 169 months of imprisonment on the drug counts, and to a consecutive term of 60 months on the firearms count. Lopez timely filed a notice of appeal.

II

ANALYSIS

A.

Lopez contends that the district court erred by limiting his cross-examination of Lazaro Garza-Lopez, a convicted drug dealer and cooperating government witness who testified against Lopez on rebuttal. Lopez claims that he was thus denied his constitutional right to confront the witness, arguing that such limitation misled the jury by preventing presentation to the jury of the full extent of that witness's drug trafficking activities.

Although the right and opportunity to cross-examine an adverse witness is guaranteed by the Sixth Amendment, the trial court has "wide latitude" in imposing reasonable restraints on the defendant's right to cross-examination. United States v. Townsend, 31 F.3d 262, 268 (5th Cir. 1994), cert. denied, 115 S. Ct. 773 (1995). A trial court's ruling that restricts the cross-examination of a witness is reviewed for abuse of discretion. Id.

We must "determine whether the trial court imposed unreasonable limits on cross-examination such that a reasonable jury might have received a significantly different impression of a witness' credibility had defense counsel pursued his proposed line of cross-examination." United States v. Baresh, 790 F.2d 392, 400 (5th Cir. 1986) (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)).

The jury heard that Garza-Lopez had been a drug dealer for 20 years; that he had an agreement with the government to testify for it; and that the agreement provided that (1) in exchange for cooperation, additional charges would not be filed against him or members of his family, and (2) his sentence would be reduced. Lopez nevertheless argues that more evidence of the extent of Garza-Lopez's drug activities and the potentially large penalties to which he had been exposed would have had a substantial impact on the jury's determination of Garza-Lopez's credibility. We do not find this argument compelling. The jury was made aware that Garza-Lopez had a great deal to gain by saying what the government wanted him to say, and that Garza-Lopez had several compelling reasons to lie. Additional evidence of the precise extent of the benefits of lying would not have substantially altered the jury's view of Garza-Lopez's testimony. The district court's restriction of the cross-examination of Garza-Lopez was not an abuse of discretion.

B.

Lopez asserts that under Federal Rule of Evidence 404(b) the district court should not have admitted rebuttal testimony of two extraneous acts of drug dealing because the testimony's prejudicial

effect substantially outweighed any probative value. Under Rule 404(b) evidence "is admissible if (1) it is relevant to an issue other than the defendant's character, and (2) the probative value of the evidence substantially outweighs the undue prejudice." United States v. White, 972 F.2d 590, 599 (5th Cir. 1992) (citing United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979)), cert. denied, 113 S. Ct. 1651 (1993).

The gravamen of Lopez's defense was (1) he was just doing a favor for someone by driving the Suburban from one point to another, (2) as he did not know what marijuana smelled like, he could not have known that there was any marijuana in the Suburban, and (3) he would not have driven the vehicle if he had known that the drugs were in it. Also, Lopez denied that he had ever been involved in drug dealing with San Miguel or had even known Garza-Lopez. The district court concluded that the Rule 404(b) evidence was relevant to the issues of (a) absence of mistake or accident and (b) knowledge. When the court admitted that evidence the jury was given a limiting instruction regarding the testimony thus admitted. Clearly, the evidence of prior meetings and discussions of drug trafficking was relevant to issues other than Lopez's character, specifically, the issue of his knowledge. Any potential undue prejudice was minimized by the trial court's limiting instructions to the jury that the prior conviction could not be considered for any purpose other than determining whether Lopez had the requisite knowledge to commit the charged offense. Under the

circumstances, the district court did not abuse its discretion in admitting the Rule 404(b) evidence.

C.

Lopez claims that the evidence was insufficient to sustain his convictions on the conspiracy, possession and firearms counts. In deciding the sufficiency of the evidence, we generally determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt. United States v. Charroux, 3 F.3d 827, 830-31 (5th Cir. 1993). Lopez moved for a judgment of acquittal at the close of the government's case-in-chief, but he failed to renew the motion at the close of all of the evidence. Failure to renew a motion for judgment of acquittal at the close of all the evidence as required by Fed. R. Crim. P. 29 waives the objection to the earlier denial of the motion. United States v. Daniel, 957 F.2d 162, 164 (5th Cir. 1992). Our review is therefore limited to determining whether there was a manifest miscarriage of justice, that is, whether the record is "devoid of evidence pointing to guilt." Id. (quotations and citation omitted).

1. Conspiracy conviction

To convict Lopez of conspiring to possess with the intent to distribute marijuana and cocaine, the government had to prove that (1) an agreement existed between two or more persons to violate the narcotics laws, (2) Lopez knew about the conspiracy, and (3) he voluntarily participated in the conspiracy. See United States v.

Bermea, 30 F.3d 1539, 1551 (5th Cir. 1994), cert. denied, 115 S. Ct. 1825 (1995).

2. Possession convictions

To convict Lopez of possessing a controlled substance with intent to distribute, the government had to prove (1) knowing (2) possession of the controlled substance (3) with intent to distribute. United States v. Ojebode, 957 F.2d 1218, 1223 (5th Cir. 1992), cert. denied, 113 S. Ct. 1291 (1993). The "[i]ntent to distribute a controlled substance may generally be inferred solely from the possession of a large amount of the substance." Id. at 1223 (internal citation and quotation omitted).

3. Weapons conviction

To convict Lopez under § 924(c)(1), the government had to prove that he (1) used or carried a firearm during and in relation to (2) an underlying drug-trafficking crime. See United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir.), cert. denied, 498 U.S. 824 (1990). The first element requires proof that the firearm played an integral part in the felony; however, it is not necessary that the weapon be employed or brandished. Id. It is enough that the firearm was present at the drug-trafficking scene, that it could have been used to protect or facilitate the operation, and that the presence of the firearm was in some way connected with the drug trafficking. Id.

Lopez does not argue that there was no conspiracy; rather he argues that there was not sufficient evidence that he knew that the Suburban contained marijuana when the sole evidence is the presence

of the odor of marijuana in the vehicle. Lopez makes this identical argument to challenge the sufficiency of his conviction for the possession with intent to distribute marijuana. He argues further that there was no evidence of his (1) intentional possession of the cocaine found in the Suburban, or (2) knowledge of the presence of the gun in the Suburban.

That Lopez was driven to the Concord Apartments in the red car and that he then drove the Suburban away from there is undisputed. Police officer Larry Martin testified that, as Lopez was leaving the parking lot, the red car, which had brought Lopez to the apartments, performed a counter-surveillance maneuver. The only finding that this supports is that the driver of the red car was aware of the contents of the Suburban. The evidence supporting Lopez's knowledge of the contents of the Suburban and the nature of the transaction comes from the evidence about the gun found in the Suburban. This evidence puts the lie to Lopez's denial of knowledge of the gun: (1) law enforcement officers had thoroughly searched the Suburban for weapons before it was loaded with the drugs at the DEA warehouse, (2) San Miguel was unarmed when he entered the Suburban and drove it to the Concord Apartments, and (3) the Suburban was under constant surveillance by law enforcement officers who testified that, except for San Miguel, no one entered the vehicle until Lopez did. The fact, thus established, that Lopez must have brought the gun with him, coupled with his exclusive control over the Suburban, establishes at a minimum that the record is not devoid of evidence of Lopez's guilt and that

there was thus no miscarriage of justice in convicting Lopez of knowingly joining the drug conspiracy, possessing with intent to distribute the drugs, and using a firearm in relation to the drug trafficking offenses. See Daniel, 957 F.2d at 164.

D.

In connection with his sentence, Lopez contends that the district court erred in declining to find him to have been a minor or minimal participant. He insists that he was just a "mule." We review the sentencing court's determination that a defendant did not play a minor or minimal role in the offense for clear error. United States v. Zuniga, 18 F.3d 1254, 1261 (5th Cir.), cert. denied, 115 S. Ct. 214 (1994).

Section 3B1.2(b) of the United States Sentencing Guidelines provides for a reduction of two levels in a minor participant's base offense level. A "minor participant" is one who is "less culpable than most other participants, but whose role could not be described as minimal." § 3B1.2, comment. (n.3). A four-level reduction is provided for a "minimal participant." A minimal participant is one who is "plainly among the least culpable of those involved in the conduct of a group." § 3B1.2(a), comment. (n.1). As most offenses are committed by participants of approximately equal culpability, "it is intended that [the adjustments for minor and minimal participation] will be used infrequently." United States v. Mitchell, 31 F.3d 271, 278-79 (5th Cir.), cert. denied, 115 S. Ct. 953 (1994).

Also in regard to his sentence, Lopez reurges his argument

that the government produced no evidence to show that he had knowledge of the drugs involved in the conspiracy. The district court noted, however, that many persons were involved in the conspiracy and that, albeit some may have been minor participants, Lopez's knowledge of the large quantity of narcotics involved and that a firearm was necessary to protect that large load was sufficient to show that Lopez was not one of those lesser participants. On appeal, Lopez has not shown that the district court was clearly erroneous in making this finding.

For the foregoing reasons, Lopez's conviction and sentence are, in every respect,

AFFIRMED.